(2) Supreme Court, U.S.
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In The

Supreme Court of the United States

STEPHEN LESLIE McELWEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

NEDRA RUIZ
California State Bar No. 72474
506 Broadway
San Francisco, California 94133
415-986-5591

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Question One: Whether this court's holdings in *United States v. Booker*, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), compels reversal of petitioner's sentencing here.

Question Two: Whether application of the Sentencing Guidelines constituted a plain error which should be corrected by this Court.

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OPINIONS BELOW

The Court of Appeals for the Ninth Circuit filed its decision (04-10162), dismissing the appeal of petitioner following the sentence imposed by the United States District Court for the Eastern District of California, the Hon. Frank C. Damrell, District Judge, Presiding, on December 17, 2004. The decision was not published (App. 1-2).

STATEMENT OF JURISDICTION

The judgment of the District Court was entered on February 27, 2004 (App. 39). The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

The District Court's judgment herein was filed on March 9, 2004. Petitioner's Notice of Appeal was timely filed on March 12, 2004 (pursuant to F.R.A.P. Rule 41(b)).

Following the dismissal of petitioner's appeal by the Ninth Circuit Court, on December 17, 2004, the jurisdiction of this Court is invoked under Title 28, United States Code 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This petition involves the Sixth Amendment to the United States Constitution which provides in pertinent part, that "In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial, by an impartial jury of the State . . . "

18 U.S.C. § 3553(b)(1) which provided, at the time here in question, and in pertinent part, that application of the Federal Sentencing Guidelines, to determine sentence, was mandatory. In *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005), this Court excised the section from the Sentencing Reform Act of 1984.

18 U.S.C. § 3742 (main ed. and Supp. 2004) is set forth in it entirety (App. 54-59).

STATEMENT OF THE CASE

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit (App. 1), dismissing petitioner's appeal from the judgment of the United States District Court, Eastern District of California, sentencing petitioner to 63 months incarceration.

By Superceding Information No. CR 03-0283 FCD, filed February 9, 2004, petitioner was charged, in Count One, with violation of Title 18 United States Code § 2252(a)(1), transporting visual depictions of minors engaged in sexually explicit conduct. Count Two alleged a violation of Title 18, United States Code § 2252(a)(4)(b), possession of visual depictions of minors engaged in sexually explicit conduct. Count Three provided that in the event that petitioner was convicted of Counts One and Two, he would forfeit his computer pursuant to Title 18, United States code § 2253 (App. 4).

On February 17, 2004, petitioner waived indictment and entered pleas of guilty to Counts One and Two of the

information. He also agreed to the forfeiture of his computer. At that time the prosecution filed the plea agreement, signed by both parties.

Sentencing was scheduled for February 27, 2004 (App. 39). The court entertained petitioner's objections to the conclusions of the federal probation officer that pursuant to United States Sentencing Guidelines 3D1.2 (Federal Sentencing Guideline Manual, 2003 ed.) the petitioner's offense level was 29. Petitioner contended that the offense level was 27 (App. 41-42).

Petitioner also contended that due to severe sexual abuse he had suffered as a child, the court should depart downward pursuant to Sentencing Guidelines section 5K2.13 and find that the defendant committed the offenses while suffering from a significantly reduced mental capacity; and that petitioner's significantly reduced mental capacity contributed substantially to the commission of the offense. (Section 5K2.13, Sentencing Guidelines, 2003 ed.)

The prosecution objected to any downward departure (App. 45). The court refused to depart downward and sentenced petitioner to the custody of the Bureau of Prisons for 63 months on each count, each count to be served concurrently for a total of 63 months.

On appeal petitioner argued that the Prosecution Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) authorized the circuit court's de novo review of the district court's refusal to depart downward. The circuit court cited their decision in *United States v. Linn*, 362 F.3d 1261 (9th Cir. 2004), and

held they lacked jurisdiction to review of the merits of petitioner's claims (App. 2).

STATEMENT OF FACTS

Facts Regarding the Offenses

As part of an ongoing investigation into adults trafficking in child pornography, a law enforcement agent went on the Internet and posed as a woman who was interested in meeting an adult who was willing to have sex with her children. On April 30, 2003, the agent received an e-mail from MrMirage95, an e-mail associated with petitioner.

On May 1, 2003, the agent and petitioner communicated in real time in an Internet chat room. They discussed arranging a meeting between the agent's "children" and petitioner so that petitioner could have sex with the children. Petitioner e-mailed four images depicting minors engaged in sexually explicit conduct.

On May 19, 2003, agents seized petitioner's computer and found the four images that had been sent to the agent as well as 39 additional images of child pornography.

Facts Concerning Petitioner

As a child, petitioner suffered from horrible abuse at the hands of his parents. Both his father and mother were addicted to drugs. On at least two occasions, petitioner was taken out of the custody of his mother because she was unable to provide a home for him. When petitioner was a little boy he was beaten by his mother and stepfather. He saw his stepfather kill his pet hamster with a

pencil. His stepfather gave petitioner and his little sister marijuana.

His stepfather beat him numerous times. His stepfather also beat his mother. Petitioner saw his stepfather ram his mother's head against a pole. The laceration required 170 sutures to repair (App. 15).

When petitioner went to live with his father the abuse continued. Petitioner's father was living with a transsexual. Petitioner's father and the transsexual would give petitioner drugs and they would both have sex with him. Petitioner's father took petitioner to orgies and allowed petitioner to engage in sex with adults, who sometimes filmed petitioner. Petitioner's father turned petitioner into a child prostitute. Petitioner's father would send him out onto the streets to earn money. When petitioner would return home, he and his father would use drugs and have sex. When petitioner was fifteen, he was raped by his father (App. 16).

When the petitioner was seventeen years of age he left home in Missouri and came to California. He eventually settled in San Francisco and supported himself as a prostitute.

As a result of these traumas, petitioner was suicidal. By the time he was nineteen, he had tried to commit suicide three times (App. 18). As an adult he suffers from a persistent disassociative condition in consequence of the many traumas he endured as a child (App. 19).

When petitioner was 21 years of age he met his current wife. Due to her love and affection and his determination to live with dignity and self respect, he was able

to leave life in the streets and become a loving husband and a productive law-abiding citizen.

ARGUMENT

I.

BASED UPON THIS COURT'S DECISION IN *UNITED STATES v. BOOKER*, A WRIT OF CERTIORARI SHOULD ISSUE AND PETITIONER'S CASE SHOULD BE REMANDED FOR RESENTENCING.

In *Booker v. United States*, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) this Court invalidated two provisions from the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998. With the excision of these two provisions, the Court held that the Sentencing Guidelines were now "effectively advisory" (*Booker*, 125 S.Ct. at 757). The court's holding in *Booker* applied to all cases on direct review (*Booker*, 125 S.Ct. at 769).

Here, petitioner never argued that the mandatory application of the Sentencing Guidelines to his case violated his Sixth Amendment rights. Ordinarily this court will not address issues not properly raised by the parties. However, a fundamental principal of American criminal jurisprudence is that a court will apply the law as it exists when rendering its decision. This principle applies even when a change to existing law occurs during the pendency of an appeal. *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S. Ct. 2006 (1974). In the absence of a legislative pronouncement or history to the contrary, this principle applies even when a change to existing law occurs during the pendency of an appeal. A new law will not be applied retroactively if such will result in manifest

injustice. Whether a retroactive application will cause manifest injustice is in turn determined by weighing three factors: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change in the law upon those rights (*Bradley*, 416 U.S. at 717).

The fact that one of the parties is a governmental entity makes the finding of manifest injustice less likely. In addition it must be noted that the change announced by the court's decisions in *Booker* implicates a matter of great national concern: the power and discretion wielded by federal judges in imposing criminal punishments. Regarding retroactive application of law Justice Marshal opined, "In great national concerns ... the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." (*United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801).

Here every aspect of petitioner's sentencing was strictly parsed according to application of the then mandatory federal Sentencing Guidelines. The district court functioned under the premise that the court's discretion was completely subservient to the Sentencing Guidelines and that failure to apply the Guidelines to petitioner's case was reversible sentencing error. The Sentencing Reform Act, 18 U.S.C. § 3553(b)(1) (Supp. 2004) commanded that the court impose a sentence of a kind, and within the range, required by the Guidelines. The *Booker* decision invalidated § 3553(b)(1) in order to render the Guidelines non-binding and therefore constitutional. *Booker* also invalidated 18 U.S.C. § 3742(e) (main ed. and Supp. 2004) which directed the standard of review for sentences and

which was premised upon the binding nature of the Guidelines. On appeal here the circuit court concluded that it lacked jurisdiction to determine the case on the merits since the Guidelines forbade review of the refusal of the court to depart downward. The formerly mandatory nature of the Guidelines deprived petitioner of the district court's discretion and the circuit court's appellate review.

Since petitioner's direct appeal in this matter was still pending this court's discretionary review, this court must remand the case for resentencing in light of the newly declared advisory nature of the Guidelines.

II.

APPLICATION OF THE MANDATORY SENTENCING GUIDELINES CONSTITUTED PLAIN ERROR SINCE PETITIONER WAS THEREBY DEPRIVED OF THE INFORMED DISCRETION OF THE DISTRICT COURT AT SENTENCING, AND APPELLATE REVIEW.

Petitioner did not challenge his sentence on the ground that the mandatory nature of the Sentencing Guidelines violated his Sixth Amendment rights. Before the court can correct an error not raised at trial, there must be an error, that is plain and that affects substantial rights. *Johnson v. United States*, 520 U.S. 461, 466-467, 137 L.Ed 2d 718, 117 S.Ct. 1544 (1997). If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. (*Johnson*, *supra*, 520 U.S. 461, 467). Where the law at the time of trial was settled and clearly contrary to the law at the time of appeal, there is error and it is plain at the time of appellate consideration.

At the time petitioner was sentenced the district court had no discretion but to follow Guidelines that were mandatory. The court was compelled by law to find that petitioner's base offense level was 29. The district court was reduced to checking on the addition of various mandatory factors compiled by the probation department. Even when the government agreed with petitioner that petitioner's offense level was 27, the court rejected this stipulation and followed the calculations of the probation department because of the mandatory nature of the Guidelines (App. 42).

The record before the district court disclosed that petitioner had suffered horrific abuse as a child. The level of sexual abuse, neglect, physical battery and emotional abuse that petitioner suffered as a child and young adult was criminal. For many years petitioner was beaten, abused and degraded by his father and mother. The abuse petitioner suffered was immoral and inhumane. Petitioner's parents had no respect for petitioner's mind or body and they tortured both.

At sentencing petitioner argued that the court should apply Guidelines section 5K2.13 and find that petitioner was suffering from significantly reduced mental capacity at the time he committed the offense. The court refused to depart downward. Petitioner's substantial rights were affected by the mandatory nature of the Guidelines. Advisory guidelines would have allowed the court discretion to depart downward based upon the enormity of the crimes suffered by petitioner as a child and young adult. Moreover, this court's invalidation of 18 U.S.C. § 3742(e) also effected petitioner's substantial rights since invalidation of the section would allow petitioner to appeal the refusal of the court to depart downward.

This court should find plain error in the application of the Guidelines as mandatory here and remand this case for resentencing in conformity with *Booker*.

CONCLUSION

For all the foregoing reasons the writ of certiorari should issue here.

Respectfully submitted,

NEDRA RUIZ
Attorney for Petitioner
STEPHEN MCEL[illegible]

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEPHEN LESLIE **MCELWEE**, Defendant-Appellant.

No. **04-10162**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

115 Fed. Appx. 412; 2004 U.S. App. LEXIS 26440

December 6, 2004**, Submitted

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

December 17, 2004, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE **UNITED STATES** COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the **United States** District Court for the Eastern District of California, D.C. No. CR-03-00283-FCD, Frank C. Damrell, District Judge, Presiding.

DISPOSITION: Appeal dismissed.

COUNSEL: for **UNITED STATES** OF AMERICA, Plaintiff-Appellee: Laurel D. White, USSAC – OFFICE OF THE U.S. ATTORNEY, Sacramento, CA.

For STEPHEN LESLIE **MCELWEE**, Defendant-Appellant: Matthew C. Bockmon, Esq., FPDCA – FEDERAL PUBLIC DEFENDER'S OFFICE, Sacramento, CA.

JUDGES: Before: GOODWIN, ALARCON, and TROTT, Circuit Judges.

OPINION: MEMORANDUM*

Stephen **McElwee** appeals from his sentence imposed following his guilty plea conviction for transporting visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(1) and possession of one or more matters containing depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2256. **McElwee** contends that the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) authorizes this court's review of the district court's denial of his motion for a downward departure. **McElwee's** contention is foreclosed by our decision in ***United States*** *v. Linn,* 362 F.3d 1261 (9th Cir. 2004) (per curiam).

DISMISSED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	**PRE-PLEA PRESENTENCE INVESTIGATION REPORT**
vs.	
STEPHEN McELWEE	**Docket Number 2:03CR00283-01**
	Status Date: 02/17/2004

Prepared For: **Honorable Frank C. Damrell, Jr.**
United States District Judge

Prepared By: **Terri L. Wilkins**
Senior United States Probation Officer
Sacramento California
(916) 930-4320

Assistant United States Attorney
Laurel D. White
501 "I" Street
Sacramento, California
95814
(916) 554-2700

Defense Counsel
Christopher H. Wing
(Retained)
1101 "E" Street
Sacramento, California
95814
(916) 441-4888

Offense:

Superseding Information – Count 1: 18 USC 2252(a)(2) – Distribution of Visual Depictions of Minors Engaged in Sexually Explicit Conduct (**CLASS C FELONY**)
Count 2: 18 USC 2252(a)(4)(B) – Possession of One or More Materials Containing Visual Depictions of Minors Engaged in Sexually Explicit Conduct (**CLASS C FELONY**)

Dates of Offenses:	***Count 1*:** 05/01/2003; ***Count 2*:** 05/29/2003
Penalty:	***Count 1*:** 5 to 20 years; $250,000; 2 year to life TSR; $100 S.A. ***Count 2*:** 10 years; $250,000; 2 year to life TSR; $100 S.A.
Mandatory Minimum:	[X]
Mandatory Drug Testing:	[X] (Crime occurred after 09/13/1994)
Mandatory Restitution:	[X] (Crime occurred after 04/24/1996)
Date of Arrest:	06/10/2003
Release Status:	06/10/2003: Bond
Codefendants:	None
Related Cases:	None
Detainers:	None
Date Draft Report Available:	01/12/2004
Date Report Revised:	02/02/2004

IDENTIFYING DATA

Date of Birth:	05/10/1969
Age:	34
Place of Birth:	Jackson County, Missouri
Citizenship:	United States
Race:	White
Sex:	Male

Height:	6'3"
Weight:	169
Eyes:	Blue
Hair:	Blond
Distinguishing Marks:	Tattoos: Right arm – "AC/DC"; Left arm – two roses and "Melanie" Scars: Left wrist; Left hand finger; Right foot (two)
SSN No:	495-88-0803
FBI No:	149976HA7
USM No:	14543-097
Other ID No:	CII: A08661616
Other ID No:	CDL: A3691598
Legal Address:	39548 Fremont Boulevard, No. 329 Fremont, California 94538 (Alameda County)
Phone Number:	(510) 484-6473
Aliases:	None
Office Location:	09722

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On November 17, 2003, the Court ordered the United States Probation Office to complete a pre-plea presentence report regarding Stephen McElwee. Both parties have agreed the pre-plea presentence report should reflect an anticipated filing of a Superseding Information charging in Count 1 a violation of 18 USC 2252(a)(1), and in Count 2 a violation of 18 USC 2252(a)(4)(B). Probation Forms 13A and. 13B are

attached which allow the presentence report to be completed and inspected by the Court.

Plea Agreement

2. Although a Plea Agreement has not yet been entered into in this case, the Assistant United States Attorney has provided a copy of the anticipated Plea Agreement in this case. The following is a summary of that Plea Agreement:

3. The defendant maintains his right to appeal his sentence if the Court denies a downward departure motion by defense counsel. The defendant will waive venue as to Count 2 of the Superseding Information and will also waive Indictment. The defendant agrees to pay a fine unless he demonstrates the inability to do so. The defendant understands he will be required to register as a sex offender.

4. The government agrees not to charge the defendant with possessing child pornography on March 14, 2003, or May 23, 2003,

5. The parties stipulate the defendant is to be sentenced pursuant to the PROTECT Act. They also stipulate the defendant should be sentenced pursuant to USSG 2G2.2. The government will recommend a 2-level reduction for acceptance of responsibility and, if the defendant pleads guilty in a timely manner, will recommend the defendant receive an additional 1-level reduction,

6. The government and defendant agree to the following stipulations affecting the guideline calculations:

Count 1:

- this base offense level is 17 pursuant to USSG 2G2.2;

- Pursuant to USSG 2G2.2(b)(1), 2 levels are added because the pictures involved prepubescent minors;
- Pursuant to USSG 2G2.2(b)(2)(E), 2 levels are added for distribution;
- Pursuant to USSG 2G2.2(b)(5), 2 levels are added for the use of a computer; and
- The adjusted offense level is 23.

Count 2:

- The cross-reference found at USSG2G2.4 will apply, and therefore, USSG 2G2.2 will apply and the base offense level is 17;
- 2 levels are added because the pictures involved prepubescent minors pursuant to USSG 2G2.2(b)(1);
- Pursuant to USSG 2G2.2(b)(3), a 4-level increase is added because the material portrayed sadistic or masochistic conduct;
- Pursuant to USSG 2G2.2(b)(5), 2 levels are added for the use of a computer;
- Pursuant to USSG 2G2.2(b)(6)(A), 2 levels are added because the offense involved at least 10 images, but fewer than 150; and
- The adjusted offense level is 27

7. Pursuant to USSG 3D1.2(d), the counts will be grouped, and the resulting offense level is 27.

8. The parties have not stipulated to any criminal history category, and the parties remain free to argue for and against any departures.

Pretrial Adjustment

9. The defendant self surrendered to the United States Marshal on June 10, 2003. He was released on a $75,000 bond the same day, and has been supervised by a Pretrial Services officer in the Northern District of California. As of the date of this report, the defendant has been compliant with all conditions of pretrial supervision.

The Offense Conduct

10. In April 2003 an undercover officer posted an ad on a "swinger" website and created a fictitious profile of a female with children who had an interest in family fun and had no inhibitions. Stephen McElwee initially responded to this ad on April 30, 2003, and stated he had similar interests and wanted to chat about family fun. On May 1, 2003, the agent responded and stated "her" interest was to find someone to help educate her young children about sex. McElwee's response was that he was interested in that type of family fun. He further stated he had learned from his father and stepmother beginning at age 13, and it had brought them very close.

11. McElwee and the agent had a real time chat and discussed their mutual interests. The agent asked McElwee if he was roleplaying or fantasizing, because "she" really wanted to find someone who was interested in teaching her children about sex. The agent told McElwee "she" would like to show her children some pictures of other children with adults, and McElwee acknowledged he had hundreds of pictures, McElwee sent the agent four pictures. The first was a picture of a prepubescent female holding an erect penis. The second image was of an adult male and a young female engaged in intercourse. The third image included oral copulation being preformed by an adult

male on a prepubescent female. The fourth image was of an adult male naked from the waist down sitting on a couch with an erect penis. A prepubescent child was straddling the male's waist.

12. One expert determined the fourth image was of a female Minor less than 12 years in age. A second expert determined the images sent by McElwee did not appear to be morphed or synthetically produced images but appeared to be real images.

13. On May 29, 2003, a search was conducted at McElwee's residence in Fremont, California. Agents seized 47 video tapes and floppy diskettes. A subsequent search of the video tapes revealed no child pornography. Agents also seized McElwee's computer located in his bedroom. A subsequent search of the computer revealed 266 pornography images, 80 of which contained child pornography, including three containing bondage-type photographs. Another search was conducted on the same date at McElwee's vacation residence in Lower Lake, California. Nothing was found at that residence.

14. On May 29, 2003, McElwee was interviewed at his residence in Fremont. He told the agents he had responded to an ad placed by a woman on a "swingers" website. The Woman Was looking for someone to teach her two children about sex. McElwee stated he responded to the ad because he felt they had similar interests, but told the agents he was just joking when he responded. McElwee also admitted that during an online, chat with this woman, he had sent her three images of minor girls having sex, both orally and vaginally.

15. McElwee stated his sexual interest in children had started approximately two years earlier, and he felt he needed therapy. He noted he had been raped at age

15 by his father. He stated he roleplayed, and at one point thought about having sex with children, but never acted on those thoughts. He admitted he had Internet communications with several other people, and had sent and received child pornography through the Internet. He stated he had approximately 20 to 30 child pornography images stored on his computer.

16. On June 10, 2003 McElwee surrendered himself to the U.S. Marshal's office and was arrested without incident.

Victim Impact

17. In Counts 1 and 2, there are no identifiable victims, as the identities of the minors exploited are not known. Nonetheless. these minors have been abused, victimized, and exploited for the profit, entertainment, and pleasure of those who supply, view, and find these depictions sexually stimulating and gratifying,

Obstruction of Justice

18. It does not appear the defendant impeded or obstructed justice in this case.

Defendant's Statement

19. The defendant has provided a lengthy, typewritten statement which will be attached for the Court's review. In summary, the defendant acknowledges the conversation he had with the undercover agent while logged on to the computer. He also acknowledges possession of the child pornography he downloaded onto his computer. The defendant describes how he feels he got to this point in his life, and also describes some of the things be has learned in therapy to help him avoid ever returning to this lifestyle.

Offense Level Computation

20. The 2003 edition of the *Guidelines Manual* has been used in this case.

21. The guideline for a violation of 18 USC 2252(a)(2) is found at USSG 2G2.2. The guideline for a violation of 18 USC 2252(a)(4)(B) is found at USSG 2G2.2 or USSG 2G2.4. USSG 2G2.4 deals with possession of child pornography, but has a cross-reference which states if the offense involved receiving, transporting. or shipping the material, USSG 2G2.2 should be used. Since both counts use the same guideline and may be grouped pursuant to USSG 3D1.2(d), they have been grouped for scoring purposes.

22. **Base Offense Level:** As previously stated above, the guideline used for Counts 1 and 2 will be USSG 2G2.2 – Trafficking, Transporting Material Involving the Sexual Exploitation of a Minor, and the base offense level is 17. 17

23. **Specific Offense Characteristics:** USSG 2G2.2(b)(1) states if the material involved a prepubescent minor, or a minor under the age of 12 years, increase the offense level by 2 levels. In this case, the pictures the defendant sent to the undercover agent did portray prepubescent minors; therefore, a 2-level increase is recommended. +2

24. USSG 2G2.2(b)(2)(E) states if the offense involved distribution, increase the offense level by 2 levels. In this case, the defendant distributed four pictures to the undercover agent; therefore, a 2-level increase is recommended. +2

25. USSG 2G2.2(b)(3) states if the offense involved material portraying sadistic or masochistic conduct or other depictions of violence, increase the offense level by 4 levels. In this ease, the pictures both sent and

possessed by the defendant contained material that was considered sadistic or masochistic or a depiction of violence; therefore, a 4-level increase is recommended. +4

26. USSG 2G2.2(b)(5) states if a computer was used for the transmission or distribution of the material, increase the offense level by 2 levels. In Count 1, the defendant transmitted four pictures to the undercover agent using a computer. In Count 2, the defendant received numerous pictures over the computer. For these reasons, a 2-level increase is recommended. +2

27 USSG 2G2.2(b)(6)(A) states if the offense involved at least10 images, but fewer than 150, increase the offense level by 2 levels. The defendant sent four images to the undercover agent, and had possession of approximately 80 images of child pornography on his computer; therefore, an increase of 2 levels appears appropriate and is recommended. +2

28. **Adjusted Offense Level (Subtotal):** +29

29. **Chapter Four Enhancements:** None. 0

30. **Adjustment for Acceptance of Responsibility;** USSG 3E1.1(a) allows for a 2-level decrease in the offense level if the defendant clearly accepts responsibility for his offense. Upon plea and in conjunction with the defendant's statements, he has accepted responsibility for his offense in this case, and a 2-level reduction is recommended. -2

31. USSG 3E1.1(b) states if the defendant qualified for a 2-level reduction and the offense level is 16 or greater, upon motion of the government stating the defendant has assisted authorities in the investigation or prosecution of his own misconduct, or by entering a plea at an early stage, an additional 1-level reduction can be made. In this case, in the unfiled Plea Agreement, it

is anticipated the defendant will enter a plea at his status date, and the government will make such a motion; therefore, a 1-level reduction Will be recommended. -1

32. **Total Offense Level:** 26

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

33. The defendant stated be was placed in a family adjustment center, a group home, and a home for boys. He said this was as a result of skipping school, stealing from his father, and basically being out of control. No records could be found due to their age.

Adult Criminal Convictions

	Date of Arrest/Age	Conviction/ Court	Date Imposed/ Sentence	Guideline/ Points	
34.	05/05/1987 (Age 17)	Passing a Bad Check (misdemeanor); Jackson County Circuit Court, Missouri, Dkt. No. Unknown	05/13/1987: 1 year probation	4A1.2(e)	0

35. No information was available due to the age of this case.

36. The defendant stated he also went to court in 1985 for Possession of Marijuana, and was given a 6-month term of probation. He stated at some point, he completed 30 days in jail. The defendant stated this was a result of violations of probation for both of his prior convictions.

Criminal History Computations

37. The total of the criminal history points is 0. According to the sentencing table at USSG Chapter 5, Part A, 0 criminal history points establish a criminal history category of I.

Other Criminal Conduct

38. The defendant's rap sheet indicates he was arrested in 1987 for Prostitution. This case was dismissed in the interest of justice.

39. In 1990, the defendant was arrested for Inflicting Corporal Injury on a Spouse, and the prosecutor rejected the case because the victim declined to testify.

PART C. OFFENDER CHARACTERISTICS

40. The following information is taken from an interview with the defendant, combined with various evaluations completed on the defendant which offer significant background information:

Personal and Family Data

41. **Current Situation:** The defendant resides with his wife and is employed full-time.

42. **Family History:** The defendant was born to the union of Stephen and Denise McElwee, he has one half-brother, Mike Colbertson, age 33. He also has one half-sister, Terry Lowden, age 31. The defendant is unsure of his siblings' whereabouts.

43. The defendant stated his father left when the defendant was approximately one year old. His mother became involved with Kevin Groth, and they eventually married. The defendant remained in his residence until he was 10 years old. He describes an extremely

abusive upbringing, and stated he was the subject of numerous beatings by his stepfather. Mr. Groth also severely beat the defendant's mother. He remembers one occasion when his mother had 170 stitches in her head after Mr. Groth slammed her head into a pole. The defendant's earliest memory of Mr. Groth was a time when he took a pencil and killed the defendant's hamster, then poked a hole in the defendant's waterbed. The defendant stated he has a scar on his foot as a result of having to stand in a corner with a bowling pin on top of his head without letting it fall. The bowling pin fell on his toe, leaving a permanent scar.

44. The defendant stated by approximately age six or seven, his stepfather was providing him with marijuana and beer. He stated this was a standard routine on Fridays, and was considered a treat by his stepfather to get the children intoxicated from either drugs or alcohol. The defendant remembers his younger sister being able to "roll a joint" by age three.

45. The defendant remembers being placed in foster care on two occasions, yet he was unsure what particular actions brought him to those placements, although he remembers one instance may have been due to his mother being caught selling heroin.

46. At age 10, the defendant's father returned. and his father and mother briefly resumed living together. The defendant's father returned after the defendant was thrown in front of a car by a group of older boys. After a very short period of time, the defendant's mother decided to pack up and leave the defendant's father. She gave the defendant a choice of going with her or staying with his father. The defendant stayed with his father. The defendant's mother left with his siblings, and he had no contact with her until he was approximately 17 years old. He stated on one occasion, approximately one month after she left, the

defendant spoke with his mother and asked her to come back. She told him he did not exist anymore, and not to call her anymore.

47. The defendant remained with his father until he was approximately 14 years old, This situation was also extremely tragic, in that the defendant was no longer physically beaten, but was exposed to additional drug use and sexual abuse.

48. Between the ages of 10 and 14, the defendant was sent to a family adjustment center, group home, and home for boys as a result of skipping school, stealing from his father, and generally being out of control. He stated he was forcibly raped in one of the alternative living facilities. He was returned to his father and stepmother's residence, where at age 13 his father injected the defendant with crystal methamphetamine. The defendant stated his father, transsexual stepmother, and he shared drags including crack cocaine, LSD, and intravenous cocaine. He stated his father, stepmother, their friends, and he used drugs and had sex. They had "swinger" friends who would take the defendant to their homes, have sex with him, and videotape the sex. By age 14, the defendant's father determined the only thing the defendant was good for was "hustling." He turned the defendant out onto the streets, the defendant would return to his father's house with money, and they would get high and have sex. The defendant would then return to the streets.

49. At age 17, the defendant left Missouri and came to California. He first went to Los Angeles, then to San Francisco. He spent four years on Polk Street in San Francisco, hustling every day. During this period of time, the defendant was exposed to many sexual extremes. The defendant recalls being tied up, spanked, choking people, urinating on people, and other sexual absurdities. Although the defendant's clientele was

male, he believes he is heterosexually oriented. The defendant remained on the streets of San Francisco until be was 21 years old.

50. The defendant has two children as a result of a relationship with Sabrina Winton. This is a relationship the defendant had while living on Polk Street. The defendant's daughter, Christine McElwee, is 15, and his son, Justin Winton, is 14. Both children have been is foster care most of their lives.

51. The defendant met his wife, Melanie, at age 21, while hustling in a gay bar in San Francisco. They maintained a relationship for approximately 10 years, and eventually married in July 2000. The defendant left the streets after meeting his wife, but they maintained a somewhat unusual sexual lifestyle. The defendant and his wife were considered "swingers," and enjoyed going to clubs. The defendant stated his wife enjoyed having sex with other women. The defendant would watch the sexual activity and join in. The defendant was on a "swinger" website when he became involved in this case.

52. The defendant's wife is employed with U.S. Food Service, and remains extremely supportive of the defendant. She has encouraged him in therapy, and believes it will help him immensely. The defendant credits his wife with saving his life.

Physical Condition

53. The defendant reported while hustling, he contacted. several sexually-transmitted diseases, but has not tested positive for HIV. He currently suffers from ulcers and liver complications. He stated approximately five years ago, his liver function failed. He received advice from a doctor that he needed to drink a lot of water and stop drinking alcohol. The liver

complication is a result of his alcohol and drug abuse. The defendant takes Protonix for his ulcer condition, and Clonidine for high blood pressure.

Mental and Emotional Health

54. The defendant has been in therapy with Eugene A. Merlin, PhD., at the East Bay Sexual Offender Treatment Program since June 2003. He has attended a 12-week sexual offender class schedule, as well as receiving individual treatment. Dr. Merlin is currently seeing the defendant on a weekly basis. Dr. Merlin stated his objective from the beginning was to keep the defendant alive, as he was extremely suicidal. Dr. Merlin stated this defendant's background is one of the more horrible upbringings he has been exposed to in his 61 years. He believes the defendant has coped better than a lot of others, and the defendant has the ability to respond and avoid suicide. Dr. Merlin believes the defendant is currently relatively stable. Dr. Merlin feels when the defendant is released from prison, a risk assessment should be completed which will aid in deciding what treatment remains necessary. Dr. Merlin also believes the current medications the defendant is taking, Zoloft, Zypreza, and Trazadone, have been beneficial to the defendant.

55. The defendant has attempted suicide on three occasions. On the first occasion, at age 15, the defendant broke a window and stabbed himself in the arm. At age 17, he held a gun to his head, was arrested, and was placed on an involuntary hold. At age 19, the defendant cut himself with a broken bottle.

56. The defendant's attorney had the defendant submit to two psychiatric evaluations. The first, a neuropsychological evaluation, and the second, a psychosexual evaluation. The neuropsychological evaluation was completed by Myla H. Young, PhD., ABPN. In

summary, Dr. Young believes the defendant was prenatally exposed to alcohol and/or drugs. the testing she conducted on the defendant shows he experiences fetal alcohol exposure. Dr. Young notes the defendant has several risk factors for re-offending, including sexually deviant behaviors, combined with a history of severe child abuse and child sexual abuse. She also notes the defendant's prior extensive drug abuse history, combined with his previous suicidal gestures, are risk factors. To the defendant's credit, Dr. Young finds the defendant is not psychopathic, and has sustained a long relationship with his wife. He has also been successful at his employment, and has no history of sexual offenses or physical harm. Her ultimate opinion is the defendant is at low risk for future sexual offending.

57. The psychosexual evaluation was completed by Larry J. Wornian, PhD. Dr. Wornian took background information on the defendant's family and personal history, sexual history, academic and vocational history, drug and alcohol history, and medical and psychiatric history. Dr. Wornian also subjected the defendant to numerous tests which are detailed in his report. In summary, Dr. Wornian found the defendant had been profoundly affected by his past history, and also believes the defendant could be mildly neuropsychologically impaired. The defendant's testing indicates he has a normal male, heterosexual profile, and his sexual interests are not with children. Dr. Wornian feels the discussion the defendant had with the undercover agent was a "desperate journey into the realm of fantasy." He opined the defendant was trying to establish some form of "excitement and intimacy in an effort to overcome his persistently disassociative condition." Dr. Wornian believes the defendant would benefit from a community-based sex offender treatment program, which would require him to remain clean and

sober. Dr. Wornian states the defendant was sentenced to prison, he would need to be assigned to a specialized treatment program to deal with the identified issues.

58. The two mental health evaluations are attached for the Court's review.

Substance Abuse

59. The defendant has an extensive prior history of alcohol and drug abuse. He began smoking marijuana with his stepfather at age six, and also began drinking at the same age. At age 12, he remembers stealing LSD from his natural father, and remembers that being his first use of any type of "heavy" drugs. He also started using methamphetamine at that age. The defendant stated his father would remove the Tylenol from Tylenol capsules, insert methamphetamine in its place, and the defendant would eat the capsules. As previously noted, the defendant's father began injecting him with drugs at age 13. The defendant stated throughout the years, marijuana has always bean his drug of choice, and has been the most difficult for him to stop using. The defendant acknowledged the use of crystal methamphetamine, crack cocaine, barbiturates, and hallucinogens. He drank alcohol until approximately five years ago, when he went for medical treatment and was told by a physician his liver had shut down due to his alcohol and drug use. He continued smoking marijuana until June 2003. The defendant has never received drug or alcohol treatment, and would like to receive treatment while in custody and upon release.

Education and Vocational Skills

60. The defendant left high school in the ninth grade, but received his high school equivalency certificate on March 23, 1999, from Hayward Adult School.

Employment Record

61. From August 2002 to the present, the defendant has been a maintenance foreman for Pasa Tiempo Apartments in Fremont, California. He earns approximately $2,300 per month, and also receives free apartment rental.

62. From December 1999 through August 2002, the defendant was an owner/operator of Ace Professional Carpet Cleaning.

63. From December 1994 through December 1999, the defendant was again the maintenance foreman for Pasa Tiempo Apartments.

64. Prom April 1993 through November 1994, the defendant was an assistant supervisor at Pathfinder Village Apartments.

65. From March 1992 through April 1993, the defendant worked in maintenance at Holiday Inn in Union City, California.

Financial Condition

66. The following is a summary of the defendant's financial condition.

ASSETS		**INCOME**	
Checking Account	$500	Defendant's Income	$1,787
Sysco Stock	30	Spouse's Income	5,200
Boat	6,000		
2001 Mustang	13,000		
1991 Chevy S10	2,500		
1994 Ford	1,200		
Vacation Home	289,000		
Parcel Lot	9,000		
Total Assets:	**$321,230**	**Total Income:**	**$6,987**

DEBTS		LIVING EXPENSES	
Boat	$3,000	Mortgages	$1,500
2001 Mustang	28,483	Groceries	500
Vacation Home	111,000	Utilities	515
Parcel Lot	13,000	Transportation	290
Credit Cards	15,000	Automobile Insurance	138
IRS	2,296	Homeowner's Insurance	86
		Life Insurance	4
		Clothing	200
		Automobile Loan	441
		Medical	550
Total Debts:	**$172,779**	**Total Expenses**	**$4,224**
NET WORTH	**$148,451**	**DISPOSABLE INCOME**	**$2,763**

Defendant's Ability to Pay a Fine/Restitution

67. No restitution is due in this case. It does appear the defendant would have the ability to pay a fine; however, given his anticipated period of confinement and uncertain future, a fine will not be recommended.

PART D. SENTENCING OPTIONS

Custody

68. **Statutory Provisions:** The maximum term of Imprisonment for Count 1 is 20 years, and the mandatory minimum is 5 years. The maximum term of imprisonment for Count 2 is 10 years.

69. **Guideline Provisions:** Based on a total offense level of 26 and a criminal history category of I, the guideline range for imprisonment is 63 to 78 months.

Provisions for a Term of Probation or Supervised Release

70. The defendant is eligible for probation of 1 to 5 years by statute. Because the offense is a felony, the statute requires that, unless extraordinary circumstances exist, one of the following be imposed as a condition of probation: a fine; restitution; or community service. Under the guidelines, probation is not authorized, except by way of a downward departure, as the minimum of the guideline range is in Zone D.

71. The term of supervised release authorized by statute is any term up to life. Pursuant to USSG 5D1.2(c), a guideline policy statement states if the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended.

Impact of the Plea Agreement

72. None.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

73. In accordance with 18 USC 3553(b)(2)(A)(ii) and USSG 5K2.0(b), the Court may only downward depart in child crimes and sexual offense cases where it finds a mitigating circumstance that has been affirmatively identified as a permissible ground for departure in the sentencing guidelines or policy statement, or in a circumstance that has not been taken into consideration by the Sentencing Commission in formulating the guidelines.

74. The defense attorney in this case has identified several issues he wishes to be considered for departure. These issues include Diminished Capacity,

Post-Offense Rehabilitation, and Extraordinary Acceptance of Responsibility.

75. Diminished Capacity, pursuant to USSG 5K2.13, is a downward departure which may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity, and the significantly reduced mental capacity contributed substantially to the commission of the offense. The defendant in this case has suffered a long history of both physical and sexual abuse which has contributed to his diagnosis of Post-Traumatic Stress Disorder and Depression. USSG 5K2.13 lists several factors the Court must consider and, if the Court finds these factors present, cannot depart below the applicable guideline range. These factors include whether or not the defendant's mental capacity was caused by voluntary use of drugs or other intoxicants, the facts and circumstances of the offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence, the defendant's criminal history indicates a need to imprison the defendant to protect the public, or the defendant has been convicted of an offense under various Chapters of Title 18, including Chapter 110. It is anticipated the defendant will enter a plea to two counts, both of which are listed in Chapter 110 of Title 18; therefore, Diminished Capacity is not an available departure to the Court.

76. The second factor the defense would like to have considered for downward departure is Post-Offense Rehabilitation. The defendant in this case has been involved in therapy with the East Bay Sex Offender Program, and has benefited greatly from this treatment. It should be noted, pursuant to USSG 3E1.1(e). Application Note 1, Post-Offense Rehabilitation efforts are listed as a reason for a defendant to receive

acceptance of responsibility. This would then require the defendant's Post-Offense Rehabilitation to be exceptional to take it outside the heartland of other cases in order for a departure to be warranted. The defendant in this case has remained out of custody, and the treatment he is receiving is deemed critical in his case. The defendant's involvement in treatment does not appear to be exceptional, as such behavior would be expected of a defendant who has "been caught" or whose criminal conduct has been detected. Had he sought treatment prior to detection, a departure consideration may have been more appropriate.

77. The defense's last factor to be considered for downward departure is Extraordinary Acceptance of Responsibility. The defense believes the defendant's debriefing and early acknowledgment of the offense is atypical and qualifies for a downward departure, USSG 5K2.0(d)(2) states the defendant's acceptance of responsibility may *only* be taken into account pursuant to USSG 3E1.1 and any further reduction is, in fact, a prohibited departure.

78. It is noted all cases cited and arguments made in the defense's letter outlining their position in regard to departures are pre-PROTECT Act. Therefore, due to the substantial restrictions now placed on the Court by statute and guidelines regarding downward departures in sex offense cases, no departures are recommended.

JUSTIFICATION AND RECOMMENDATION

TOTAL OFFENSE LEVEL: 26

CRIMINAL HISTORY CATEGORY: I

	Statutory Maximum	**Guideline Provisions**	**Recommended Sentence**
CUSTODY:	Count 1: 20 years Count 2: 10 years	63 to 78 months	63 months (each count, c/c)
PROBATION:	5 years	N/A	N/A
SUPERVISED RELEASE:	Life	2 years to life	3 years (each count, c/c)
FINE:	$250,000 (each count)	$12,500 to $125,000	0
RESTITUTION:	N/A	N/A	N/A
SPECIAL ASSESSMENT:	$100 (each count)	$100 (each count)	$200

Justification

79. Appearing before the Court for sentencing is 34-year-old Stephen McElwee. It is anticipated he will plead guilty to a Superseding Information charging him with a violation of Distribution of Visual Depictions of Minors Engaged in Sexually Explicit Conduct, and Possession of Visual Depictions of Minors Engaged in Sexually Explicit Conduct. This defendant engaged in an online discussion with an undercover agent regarding the possibility of the defendant teaching "her" two minor children about sex. The agent asked the defendant for some pictures, because "she" wanted to show the children pictures of other children with adults. The defendant then sent the agent four pictures of child pornography. A subsequent search of the

defendant's residence and computer revealed a total of approximately 80 images containing child pornography and sadistic or masochistic images.

80. After reviewing this defendant's history and acknowledging the horrendous physical and sexual abuse he suffered at the hands of his mother, father, and stepfather, there is no difficulty understanding how the defendant became involved in this case. This defendant has been subject to some of the most depraved sexual abuses imaginable, and it would seem sexual normalcy would be difficult for him to define. This defendant has been involved in sex offender treatment for approximately six months, which is his first exposure to therapy of any kind. For the first time, this defendant learning about himself and the fact he was truly a victim first. It is believed with continued treatment, combined with the defendant's motivation for help, he can look forward to a more grounded future.

81. A sentence of 63 months, the bottom of the guideline range, is recommended. It appears this sentence will meet the needs of sentencing, and allow the defendant to receive the necessary treatment while incarcerated.

82. Upon release from confinement, a 3-year term of supervised release is recommended, although the policy statement found at USSG 5D1.2(c) recommends the defendant receive the statutory maximum term of supervised release, which would be life. The 3-year term will allow the defendant the treatment necessary to become acclimated to society, and to help him deal not only with his sexual issues, but also his drug and alcohol abuse issues. He will have received five years of counseling while in custody. Numerous conditions regarding sex offenses will be recommended: warrantless search; computer restrictions; child pornography abstention; sex offender registration; and

sex offender therapy. Conditions regarding drug and alcohol testing and treatment will also be recommended, due to this defendant's extensive past history with these substances.

83. There is no restitution due in this case, A fine will not be recommended, so the defendant can continue to focus on the numerous issues he has to conquer.

Recommendation

It is respectfully recommended that sentence be imposed as follows:

Pursuant to the Sentencing Reform Act of 1984, IT IS THE JUDGMENT OF THE COURT that the defendant, Stephen McElwee, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 63 months on each of Counts 1 and 2, to be served concurrently for a total term of 63 months. The defendant shall pay a special assessment of $200, due immediately. The Court finds the defendant does not have the ability to pay a fine, and imposition of a fine is waived.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 36 months on each of Counts 1 and 2, to be served concurrently for a total term of 36 months. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall not possess a firearm as defined in 19 USC 921, shall not illegally possess controlled substances, and shall comply

with the standard conditions which have been recommended by the United States Sentencing Commission and adopted by this court (see attached).

Further, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on supervised release and at least two drug tests thereafter, as directed by the probation officer.

The Court adopts the special conditions recommended by the probation officer on pages *23 through 25* of the presentence report and imposes all of those listed as special conditions.

The defendant shall also comply with the following special conditions:

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States Probation Officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. As directed by the probation officer, the defendant shall participate in a correctional treatment program (inpatient or outpatient) to obtain assistance for drug or alcohol abuse.

3. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.

4. The defendant shall abstain from the use of alcoholic beverages and shall not frequent those places where alcohol is the chief item of sale.

5. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of $5 per month.

6. The defendant shall not possess or use a computer or any other device that has access to any "on-line computer service." This includes any Internet service provider, bulletin board system, or any other public or private computer network.

7. The defendant shall have no contact with children under the age of 18 unless approved by the probation officer in advance. The defendant is not to loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18. This shall include that the defendant is not to engage in any occupation, either paid or volunteer, which exposes him directly or indirectly with children under the age of 18.

8. The defendant shall (i) consent to the probation officer and/or probation service representative conducting periodic unannounced examinations of any computer equipment or device that has an internal or external modem which may include retrieval and copying of all data from the computer or device and any internal or external peripherals to ensure compliance with conditions and/or removal of such equipment for purposes of conducting a more thorough inspection; and (ii) consent at the direction of the probation officer to having installed on the computer or device, at defendant's expense, any hardware

or software systems to monitor the computer or device's use.

9. The defendant shall not possess, own, use, view, read or frequent places with any sexually explicit material in any form that depicts children under the age of 18. Sexually explicit conduct is defined at 18 USC 2256(2) and means actual or simulated (a) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person under the age of 18.

10. The defendant shall provide all requested business/personal phone records to the probation officer. The defendant shall disclose to the probation officer any existing contracts with telephone line/cable service providers. The defendant shall provide the probation officer with written authorization to request a record of all outgoing or incoming phone calls from any service provider.

11. The defendant shall consent to third party disclosure to any employer or potential employer, concerning any computer related restrictions that are imposed upon him/her. This includes any activities in which you are acting as a technician, advisor, or consultant with or without any monetary gain, or other compensation.

12. The defendant shall attend, cooperate with, and actively participate in a sex offender treatment and therapy program (which, may include, but is not limited to risk assessment, polygraph examination, computer voice stress analysis [CVSA], penile plethysmograph and/or ABEL assessment) as approved and directed by the probation officer and as recommended by the assigned treatment provider.

13. The defendant shall register, as required in the jurisdiction in which he resides, as a sex offender.

14. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

Release Restrictions

It appears the defendant is a person whose release pending sentence or appeal is restricted under 18 USC 3143.

Institutional Recommendation

If the Court intends to recommend incarceration at a specific location, the following language is respectfully suggested:

> The Court recommends the defendant be incarcerated at FMC in Butner, North Carolina, but only insofar as this recommendation accords with security classification and space availability.

[ ] YES; [X] NO; The Plea Agreement contains a provision pertaining to waiver of appeal rights.

OPTIONAL APPEAL RIGHTS ADVISEMENT: The defendant is hereby advised that he has the right to appeal. If you desire to appeal, you must file your Notice of Appeal in writing with the Court within ten days of today's date. If you can't afford an attorney for your appeal, the Court will appoint one for you.

Respectfully submitted,

SUE H. SORUM
Chief United States
Probation Officer

/s/ Terri L. Wilkins
TERRI L. WILKINS
Senior United States
Probation Officer

February 2, 2004
Sacramento, California
TLW:rch

Approved:

/s/ Karen A. Meusling
KAREN A. MEUSLING
Supervising United States Probation Officer

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without permission of the Court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6. The defendant shall notify the probation officer ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Defendant's Approval To Institute a Presentence Investigation Before Conviction or Plea of Guilty

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I, Stephen McElwee, hereby consent to a presentence investigation by the probation officers of the United States district courts. This Investigation is for the purpose of obtaining information useful to the Court in the event I should hereafter plead guilty or nolo contendere or be found guilty.

By this consent, I do not admit any guilt or waive any rights. I understand that any reports prepared will not be shown to the court unless and until I have been found guilty or entered a plea of guilty or nolo contendere. I understand, however, that I may hereafter agree in writing to disclosure of such reports to the court before I have been found guilty or entered a plea of guilty or nolo contendere.

I have read, or had read to me, the foregoing consent and fully understand it. No promise has been made to me as to what final disposition will be made of my case.

/s/ Stephen McElwee	12-30-03
Signature of Defendant	Date
/s/ Christopher Wing	12-30-03
Defendant's Attorney	Date

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Defendant's Consent to the Court's Inspection of Presentence Report Prior to Plea of Guilty, Nolo Contendere, or Finding of Guilt

---

I, Stephen McElwee, hereby consent to review of my presentence report by a judge at any time, including the time prior to entry of a plea of guilty or nolo contendere or a finding of guilt.

I have read, or had read to me, the foregoing consent and fully understand it. No promise has been made to me as to what final disposition will be made of my case.

/s/ Stephen McElwee	12-30-03
Signature of Defendant	Date
/s/ Christopher Wing	12-30-03
Defendant's Attorney	Date

STATEMENT OF STEPHEN MCELWEE

At the time that Melanie and I got together, I was basically living on the streets and hustling to survive. We have been together for 13 years now and I knew that she basically saved my life. My biggest fear now is how she will do while I am gone to prison. I know she is strong, but I worry about her. As for me, my arrest has been the reason that I have gotten into therapy and has actually helped me understand myself better. In many ways it has been a positive thing.

After we had to close our carpet cleaning business because of the downturn in the economy, I went back to work in apartment maintenance. I returned to Pasa Tiempo Apartments, the Senior complex in Fremont, where I had worked before. The work is interesting and I am pretty good at it. At Pasa Tiempo they provide an apartment, where Melanie and I moved. After we moved in, I bought a new computer and started spending a lot of time on it.

My time on the computer became almost like an addiction. I spent more and more time on it. I started going to the porn sites. Melanie became aware of what I was doing and questioned me about it. She joked some about it, but never came down hard on me for it. She did not know that I had started looking at some of the child pornography. She only knew about the adult stuff, which is where I spent most of my time.

I also got involved in chat rooms. That is where I met the undercover officer. We started chatting. It got more and more outrageous. It was kind of like a game. I have never been interested in children sexually, but I talked about it in the chat rooms and I know I led the officer to believe that I was interested in children.

I know that I have had a very strange history of sexual activity. My father basically introduced me to hustling and I did that for several years before Melanie and I met. Even with all of that, I have never been into children sexually. The conversations that I had with the officer were just that, conversations. I had no intention of meeting her or her "kids."

I did download child pornography. I was curious about it and I was interested in looking at it. Most of the images that I had, however, were of adult women, not children. Some of the child pornography was interesting to me, which is the reason that I kept it. As I have been in treatment, I now realize that I was just looking for more and more unusual stuff.

The other thing that I have learned in therapy is that by just downloading the child pornography it encourages people to make it and exploit children. Because I have never made any pornography, I never really thought that by downloading it I was hurting anyone. I can see that now and I am sorry that I had anything to do with it.

I want to use my time to continue to work on myself. Melanie and I have actually built a pretty good life together and I hope that I can return to it after I serve my sentence. My treatment has been a good start at understanding myself and helping to make sure nothing like this ever happens again.

Respectfully,

/s/ Stephen McElwee
Stephen McElwee

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
FRANK C. DAMRELL, JR., JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. STEPHEN MCELWEE, Defendant.	)	No. Cr. 03-0283 FCD

REPORTER'S TRANSCRIPT

JUDGMENT AND SENTENCING

FRIDAY, FEBRUARY 27, 2004

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* * *

[1] SACRAMENTO, CALIFORNIA

FRIDAY, FEBRUARY 27, 2004, 10:00 A.M.

THE CLERK: Calling criminal case, 03-283, United States versus Steven McElwee. It's on for judgment and sentencing, Your Honor.

MS. WHITE: Laurel White for the United States.

MR. WING: Christopher Wing on behalf of Mr. McElwee, to my right.

THE COURT: This is the time and place set for the pronouncement of judgment and sentence in this matter.

On the 17th of February, 2004, the defendant appeared before this Court with his attorney, Mr. Wing, and entered pleas of guilty to violation of Title 18 of the United States Code Section 2252(a)(1), transporting visual depictions of minors engaged in sexually explicit conduct, and Count Two, violation of 2252(a)(4)(B), possessing images depicting minors engaged in sexually explicit conduct. There's also a forfeiture count that was admitted.

The pre-plea report was filed in this matter on the 12th of January 2004, and a supplemental filed on the 2nd of February 2004.

The Court has read and considered those reports. Counsel, have each of you received copies of those [2] reports?

MS. WHITE: Yes, Your Honor.

MR. WING: Yes.

THE COURT: Have you reviewed – I'll ask him some questions.

First of all, did you review the report with your client in detail, Mr. Wing?

MR. WING: Yes, we have.

THE COURT: Mr. McElwee, did you have an opportunity to review the report in detail with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: As well as all the other matters that were submitted to the Court, including the evaluations by Dr. Wornian and Dr. Young?

THE DEFENDANT: Yes.

THE COURT: There's obviously objections to the findings and the report, Mr. Wing. I think we'll take those up at this time before we proceed to any comments about the sentencing itself, because the Court wants to make those findings before sentencing and before any argument about the sentencing issues.

The probation officer finds an offense level of 26, a criminal history category of one, a guideline range of 63 to 78 months, and in your objections to the presentence report, you argue that the probation officer improperly groups the [3] offenses which she yields an offense level of 29 as opposed to the offense level of 27 as the parties agreed to in their plea agreement.

MR. WING: Correct.

THE COURT: Do you wish to address the Court on that issue?

MR. WING: As I believe I pointed out in my objections, it is my belief that the way that – my belief the way we came to the level 27 as articulated in the plea agreement is the correct way and that the counting of the extra two levels is not the way it should be done under –

THE COURT: 3D1.2?

MR. WING: Right. 3D1.2. When you follow the advice under – in other words, you add them in separately. But when you put the two of them together, it comes to a level of 27, as we have done under the plea agreement.

THE COURT: Ms. White, do you agree with that analysis? It doesn't seem as correct to me. I understand you have a plea agreement. I'm not – any departure from your agreement. You did enter into that?

MS. WHITE: That's correct, Your Honor, and that's the way I've always done it. I do acknowledge that I may be wrong in this particular case. I defer to the probation officer in this particular case, Your Honor, and I acknowledge that I may have been mistaken, notwithstanding [4] that fact that was what we stipulated to.

It doesn't effect the government's recommendation because we're recommending what would end up being the low end of that particular guideline, but I may be wrong.

THE COURT: Well, I believe that probation officer has it right. The probation officer has calculated the first count with the base level of 17: The pre-probation factor plus one, distribution plus one, computer plus two, use of computer plus two, for a total of 23, which the parties have agreed upon, the same as the parties have calculated as to Count Two: Which would yield offense level of 27 after adding the sadistic factor, which is plus four, and the number of images ten to 150, which is plus two, in addition to the use of the computer and the pre-probation factors.

However, when the distribution factor is added in the grouping, it yields an offense level of 29, and the Court

will so find that properly under the provisions of 3D1.2, grouping of 2G2.2 yields an offense level in this case of 29.

Now, is there any reason that – I guess we should consider the other recommendations or the objections before proceeding to sentencing.

Counsel, you want to address the Court with respect to those arguments that you've addressed already in your brief or submit it based on the brief?

MR. WING: Unless the Court has any questions, I've [5] tried to lay out what our analysis is. It seems perhaps at least from the government's perspective as far as the equal protection argument, I should explain what I am saying.

THE COURT: That would help.

MR. WING: What I'm saying, the problem we have in this mandatory minimum without a safety valve, when you compare what would be a 60-month minimum sentence, which would be a violation of either 2252, or 2252(a), (a)(1), (2), (3), all of those with one photograph which shows conduct of a minor would be sufficient to invoke a five-year minimum mandatory; however, if that minor was in that position of having been given drugs by someone prosecuted federally under Title 21 and that person had no record and that person was not a manager and that person basically sat down and told the officers and the government what participation it had in the crime, that person would be eligible for a safety valve.

I realize the statute's not there, but that is the argument.

THE COURT: I understood that argument. That doesn't help me, I think we're dealing with apples and oranges, but that is part of the Equal Protection Clause.

Do you want to respond to that, counsel?

MS. WHITE: I think I address that issue in the government's brief, noting that Congress has made findings wherein Congress has specifically articulated it has a [6] compelling state interest in this area of criminal violations, but I have nothing to add.

THE COURT: I would concur. This is a case where Congress has addressed this issue with great specificity, and as the government's noted, made specific findings, which I believe – given that legislation and those findings, I don't believe there is a violation of the Equal Protection Clause.

With respect to the departure issue, I presume that – the Court does find that the defendant is not entitled to downward departure as both offenses are under Chapter 110 of Title 18 and filed in a group of offenses to which provisions 5K2.13 do not apply.

Now, with respect to the other issues that have been raised, anything further you want to add, Mr. Wing?

MR. WING: Your Honor, the only thing I would like to add is that the Court now having found this to be a level 29, I would ask the Court, which would be a low-end recommendation, as the probation office makes of 63 months, I would ask the Court to do a downward departure of three months to give Mr. McElwee the five-year minimum mandatory sentence based upon all the factors that we have provided to the Court, those which were present at the time of the offense as a result of his

upbringing, his fetal alcohol effects, post-traumatic stress, all of those Geshault factors as well as the activities in which he has engaged in since he [7] was arrested, which I consider to be extraordinary.

I think even though that doesn't merit perhaps going down below the minimum mandatory, I think a 60-month sentence is more than adequate in this case for this man.

And I submit to the Court.

THE COURT: Ms. White?

MS. WHITE: For the reasons set forth in the government's brief, I don't think Mr. Wing has made a showing that the defendant is entitled to any downward departure on any of the bases he cites. There has not been an extraordinary showing of acceptance of responsibility or super-acceptance of responsibility, nor has there been a showing of extraordinary post-offense rehabilitation.

I think Mr. McElwee, like any other similarly-postitioned defendant facing these crimes and having entered his guilty plea to having committed these crimes, should be commended.

But it is not an extraordinary thing for someone who is out on bail pending charges to seek psychological help. That's more the norm than not. I simply think that Mr. Wing has failed to carry his burden beyond a preponderance of the evidence or with a preponderance of the evidence and he's entitled to any downward departure.

We would submit it.

I think the 63 months is a fair sentence for this [8] defendant, taken into consideration all of the factors that

the Court is required to address under 18 U.S.C. section 3553(a).

And we would submit it.

THE COURT: Mr. McElwee, do you wish to address the Court before the Court imposes sentence? You can do so from the chair, if you wish.

THE DEFENDANT: I ask that you show mercy, please. I have – I know I messed up. I needed help. I've been getting the help. Please, please, have mercy. I can do 60 months, but I don't know, you know? I really don't know.

THE COURT: Well, the Court has reviewed, as I indicated, everything that's been submitted. In some cases, the summations have been in exquisite detail, particularly Dr. Wornian's recitation, of the horrific life that this young man has experienced as well the horrific depiction of the children and the images that were apparently an object of his obsession, all of which is a terrible, terrible consequence of both this defendant's conduct and the conduct of his parentage and those he associated with perhaps by necessity in his youth. It's a terrible picture that has been painted.

Obviously, when reviewing that, you would have to be a rather hard-hearted person to not have sympathy for Mr. McElwee. Obviously, his life was destined in many [9] respects for violence and the type of conduct that's already been described in detail, as I indicated. But, nevertheless, the Court is also faced with the violence done to the children that are the subject of these offenses.

I don't believe this Court can make a finding that based upon the conduct of the defendant, which has been

commendable, to say the least, maybe heroic. I'm not sure many human beings would come out of his life to this stage and continue on with the passion he has. To that extent, this defendant can salvage his life, evidently. He seems to have the will to do so, tremendous survival skills in the face of terrible circumstances.

But, again, and, again, I have to come back to the children who were the object of his obsession, and while he may have strong heterosexual tendencies and may not have the capacity or the desire to ultimately consummate his imagined sexual conduct, I certainly can't find that he would not have done so.

Clearly, the violence and the abuse of the children when they're the subject of the offenses has to be considered. Their safety, the safety of society has to be considered. And as well, I think the compelling interest to be assured that Mr. McElwee receives the treatment that he has to receive in an environment that insures that that treatment will be continued on a sustained basis, and I have [10] no way assuring myself that that would happen if he's not committed, at least for the 63 months as recommended by the probation officer.

So despite the horrific details of Mr. McElwee's own life, taking into account those matters I have just alluded to, in particular, the children that are involved who are the subjects of the violence and abuse, which is the subject of these crimes, I'm going to follow the recommendation of the probation officer in this matter.

In that regard, the probation officer has recommended FMC and Butner, North Carolina, and I believe that would be appropriate.

MS. WHITE: Yes.

MR. WING: I think Butner is probably the most advantageous at this point.

THE COURT: That's what Ms. Wilkins advises me, and that would be the best interest of all concerned.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Stephen McElwee, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 63 months on each count to be served concurrently for a total term of 63 months.

The defendant shall pay a special assessment of $200 due immediately. The Court finds that the defendant does not [11] have the ability to pay a fine, and imposition of the fine is waived.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 36 months on each of Counts One and Two to be served concurrently for a total term of 36 months.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district in which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime.

Shall not possess a firearm as defined in Title 18 of the United States Code Section 921.

Shall not illegal possess controlled substances and comply with the standard conditions which have been

recommended by the United States Sentencing Commission and adopted by this Court.

Further, the defendant shall refrain from any unlawful use of a controlled substance.

Submit to one drug test within 15 days of release on supervised release and at least two drug tests thereafter as directed by the probation officer.

The Court adopts the special conditions recommended by the probation officer on pages 23 through 25 of the [12] presentence report and imposes all of those as listed special conditions.

In addition, the Court recommends that the defendant be incarcerated at FMC in Butner, North Carolina, insofar as this recommendation accords with security classification and space availability.

Mr. McElwee, the Court advises you that you have the right to appeal from your conviction if you believe that your plea was somehow unvoluntary or unlawful or if there is some other fundamental defect in these proceedings not waived by your guilty plea. You also have a statutory right to appeal your sentence if you believe it was unlawful.

You have waived some of those rights, but there is a conditional waiver in this case; nevertheless, you may present that argument to the appellate court if you believe the sentence was improper.

With few exceptions any notice of appeal must be filed within ten days of the date of judgment.

If you cannot afford the cost of the appeal, you will be permitted to proceed without payment of cost.

If you cannot afford counsel, one will be appointed to represent you.

If you request it, the clerk of the court will prepare and file a notice of appeal on your behalf.

The Court now remands the defendant to the custody of [13] the United States Marshal to serve the sentence imposed.

MS. WHITE: Thank you, Your Honor.

The government moves to dismiss the Indictment which is pending.

THE COURT: Motion granted.

(Whereupon, proceedings concluded at 10:27 a.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ ML Babbitt
MICHELLE L. BABBITT,
CSR 6357

McGREGOR W. SCOTT
United States Attorney
LAUREL D. WHITE
Assistant U.S. Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2780

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. STEPHEN MCELWEE, Defendant.	) CR. S-03-0283-FCD) VIOLATIONS: 18 U.S.C. § 2252(a)(1) – Transporting Visual Depictions of Minors Engaged in Sexually Explicit Conduct (1 Count); 18 U.S.C. § 2252(a)(4)(B) – Possessing Images Depicting Minors Engaged In Sexually Explicit Conduct (1 Count); 18 U.S.C. § 2253 – Forfeiture.

SUPERCEDING INFORMATION

(Filed Feb. 9, 2004)

COUNT ONE: [18 U.S.C. §2252(a)(1) – Transporting Visual Depictions of Minors Engaged In Sexually Explicit Conduct]

The United States Attorney charges: THAT

STEPHEN MCELWEE,

defendant herein, on or about May 1, 2003, in Sacramento, State and Eastern District of California and elsewhere, did knowingly ship and transport in interstate and foreign

commerce by electronic mail ("email"), via computer and through America OnLine (AOL), visual depictions of minors engaged in sexually explicit conduct, to wit: image files titled "!!!8hand.jpg", "flokii.jpg", and "fghb.jpg", the production of which involved the use of minors engaged in sexually explicit conduct as defined in Title 18, United States Code, Section 2256, all in violation of Title 18, United States Code, Section 2252(a)(1).

COUNT TWO: [18 U.S.C. §2252(a)(4)(b) – Possession of Visual Depictions of Minors Engaged In Sexually Explicit Conduct]

The United States Attorney further charges: THAT

STEPHEN MCELWEE,

defendant herein, on or about May 29, 2003, in Fremont, State and Northern District of California, did knowingly possess one or more matters, to wit, at least one computer hard drive, which contained visual depictions of minors engaged in sexually explicit conduct, which were produced using materials which had been mailed, shipped, and transported in interstate and foreign commerce and via computer and which visual depictions were transported and shipped in interstate commerce, and the production of which visual depictions involved the use of minors engaged in sexually explicit conduct as defined in Title 18, United States Code, Section 2256, all in violation of Title 18, United States Code, Section 2252(a)(4)(B).

COUNT THREE: [18 U.S.C. § 2253 – Forfeiture]

The United States Attorney further charges: THAT

STEPHEN MCELWEE

defendant herein, upon conviction for violating 18 U.S.C. §§ 2252(a)(1) and 2252(a)(4)(B), as alleged in Counts One

and Two above, shall forfeit to the United States his interest in any and all matter which contains visual depictions produced, transported, shipped or received in violation thereof; any property constituting or traceable to gross profits or other proceeds the defendant obtained directly or indirectly as a result of the said violation; and any and all property used or intended to be used in any manner or part to commit and to promote the commission of the aforementioned violations, including but not limited to the following:

(1) One "Protek" CPU, serial # LP0274832,

All in violation of Title 18, United States Code, Section 2253.

McGREGOR W. SCOTT
United States Attorney

By: /s/ Laurel D. White
LAUREL D. WHITE
Assistant U.S. Attorney

18 U.S.C.S. § 3742. Review of a sentence

(a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18 USCS § 3563(b)(6) or (b)(11)] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of

probation or supervised release under section 3563(b)(6) or (b)(11) [18 USCS § 3563(b)(6) or (b)(11)] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements. In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure –

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposes is less than the sentence set forth in such agreement.

(d) Record on review. If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals –

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration [Caution: In United States v. Booker (2005) 543 US ___, 160 L Ed 2d 621, 125 S Ct 738, the Supreme Court held (1) that 18 USCS § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the requirements of the Sixth Amendment and therefore must be severed and excised from the Sentencing Reform **Act** of 1984, and (2) that 18 USCS § **3742**(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised.]. Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c) [18 USCS § 3553(c)];

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)]; or

(ii) is not authorized under section 3553(b) [18 USCS § 3553(b)]; or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title [18 USCS

§ 3553(a)] and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) [18 USCS § 3553(c)]; or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition. If the court of appeals determines that –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand. A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 [18 USCS § 3553] and with such instructions as may have been given by the court of appeals, except that –

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) [18 USCS § 3553(c)] in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate. An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range. For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions. For purposes of this section –

(1) a factor is a "permissible" ground of departure if it –

(A) advances the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)] and

(B) is authorized under section 3553(b) [18 USCS § 3553(b)]; and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).